IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1788 OF 2005.

Abdul Samad Gulam Rasul Inamdar ...Appellant

Versus

Maharashtra Housing & Area Development Authority & Ors. ...Respondents

Shri Saeed Akhtar for the Appellant.

Shri S.P.Thorat for the Respondent No.1.

CORAM : ABHAY S.OKA, J.
DATED : 03rd December, 2007.

JUDGMENT:

1. By order dated 20th March,2 006 notice for final disposal at admission stage was issued by this Court. Accordingly, notice has been duly served to the first respondent. Shri Thorat, learned counsel appears for the first respondent. The advocate for the appellant states that the respondent Nos.2A and 2B have been duly served and affidavit of service has been filed.

2. The appellant is the original plaintiff. The suit filed by him for injunction has been dismissed by the trial Court. He invited my attention to the impugned judgment and order. He submitted that Chamber Summons No.591 of 2004 was taken out by the appellant for amendment of the plaint for the purposes of incorporating various details of various premises

allotted to Moinuddin S. Khalil. He pointed out that the said Chamber Summons was dismissed and a Writ Petition was filed in this Court for challenging the said order. He pointed out the order passed by this Court which permits the appellant to challenge the aforesaid order alongwith the final order which may be passed in the suit. He submitted that as there was no written statement filed by any of the respondents (original defendants), the suit ought to have been decreed.

3. The learned advocate for the first respondent invited my attention to the findings recorded by the trial Court. He pointed out that the appellant could not establish any right to continue in the possession of the transit accommodation. He submitted that as the appellant has no right, the trial Court was right in dismissing the suit. He also invited my attention to finding recorded in paragraph No.6 of the impugned judgment and order and submitted that no interference is called out.

4. I have given careful consideration to the submissions made before me. At the outset it must be noted that the trial Court has not framed any issues. There is nothing on record to show that any issue

regarding maintainability or jurisdiction was framed and was ordered to be treated as a preliminary issue.

5. I have perused the Chamber Summons No.591 of 2004. The said Chamber Summons was filed for incorporating various factual assertions in the plaint. By the said Chamber Summons a case was sought to be made out that entire second floor of the building in question admeasuring 1376 sq. feet was in occupation of the grandfather of the plaintiff-appellant. It is stated that a portion of area of 590 sq feet was in use and occupation of the real brother of the appellant's grandfather. A contention is sought to be raised by the amendment that there was one joint tenancy in respect of the entire 2nd floor and separate room numbers were not allotted. A reference has been made to notices issued by the first respondent. He has placed reliance on a Will allegedly executed by his grandfather in his favour.

6. Considering the text of the proposed amendment, in my view, this was a fit case where amendment ought to have been allowed by the trial Court as the proposed amendment would not change the nature of the suit. The learned trial Judge has committed an error by not permitting amendment in terms of the Chamber Summons.

7. None of the defendants had filed any written statement. As a consequence of grant of amendment, order of remand will have to be passed so that amendment can be carried out and defendants can file their written statement. The ad-interim relief granted by this Court deserves to continue for a reasonable time to enable the appellant to amend the plaint and to take out a fresh Notice of Motion for grant of interim relief.

8. Hence, I pass the following order:

(i) The impugned judgment and order is quashed and set aside and S.C.Suit No.6084 of 1994 is restored to the file.

(ii) The parties are directed to appear before the trial Court on 14th January, 2008 at 11.00 a.m.

(iii) The Chamber Summons No.591 of 2004 is hereby allowed. Within a period of one week from 14th January, 2007 the plaintiff will carry out the amendment and will serve the amended copy to the defendants or their advocates.

(iv) Ad-interim relief granted by this Court will

continue to operate till 18th February, 2008. It will be open for the appellant to take out a fresh Notice of Motion for grant of interim relief after carrying out amendment to the plaint. If such Notice of Motion is taken out, the trial Court will decide the same in accordance with law without being influenced by grant of ad-interim relief by this Court.

(v) Hearing of the suit is expedited. All contentions of the parties on merits of the suit are expressly kept open.

(vi) The appeal is partly allowed in above terms.

(vii) No orders as to costs.

(viii) The advocate for appellant will serve authenticated copy of this order to the respondent Nos.2A and 2B.

(ix) The parties and concerned Court to act upon an authenticated copy of this order.

JUDGE